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CHARLES ELMORE CROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 51.

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS et al.,
Appellants,
vs.
THE UNITED STATES OF AMERICA,
Appellee.

BRIEF AND ARGUMENT FOR APPELLANTS.

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BRIEF AND ARGUMENT FOR APPELLANTS.

MAY IT PLEASE THE COURT:

The appellants here stand convicted of a violation of Section 1397, Title 26, U. S. C. A. (R. S., Sec. 3281; Feb. 8, 1875, c. 36, Sec. 1C, 18 Stat. 310), the second count of this indictment (to which this appeal is limited) charging:

May 4, 1934—**Indictment**, filed as follows:

"In the District Court of the United States of America
for the Eastern District of Wisconsin.

"At a regular term of the District Court of the United States of America for the Eastern District of Wisconsin, to wit, at the regular January Term thereof in the year of our Lord One Thousand Nine Hundred and Thirty-four, held at the City of Milwaukee, in said Eastern District of Wisconsin.

"Second Count.

"And the Grand Jurors aforesaid, upon their oath aforesaid, further present:

"That on or about the first day of March, in the year nineteen hundred and thirty-three, at the City of New London, in the Counties of Waupaca and Outagamie, Wisconsin, in the Eastern District of Wisconsin and with the Internal Revenue District of Wisconsin and within the jurisdiction of this court,

Hyman Wainer, alias Heine Wainer, alias Henry Wainer,

Sam Wainer,

Louis Wainer,

Pete Bondie, alias Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson,

August Becker,

Earl Blink,

Donald Blink, alias 'Buck' Blink,

Charles Christenson, alias Charles Christianson,

Ervin Dorschner, alias Abe Dorschner,

Sid Freeman,

Floyd Granger,

Ed Lueke,
Merle Ravey,
Ed Rossey, alias Ed Rosey, alias Ed Rossi,
Gus Rossey, alias Gus Rosey, alias Gus Rossi,
Louis Sasse,
Howard Siats, alias 'Doc' Siats,
Adolph Siebold,
John Trambar,
Alfred Tessen, alias Al Taustin, and
Theodore Wallmer, alias Ted Wallmer,

the identical persons named in the first count of this indictment, did then and there wilfully, unlawfully and feloniously engage in carrying on the business of a wholesale liquor dealer without having paid the special tax as required by law, within the intent and meaning of the Internal Revenue Laws of the United States of America; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

This Court has granted certiorari to review the question whether the statute on which the said second count of the indictment is based was repealed and has not been re-enacted.

The section of the law last quoted is as follows:

"Section 1397. Penalties and forfeitures. (a) Rectifiers, liquor dealers, dealers in malt liquors, and manufacturers of stills—(1) Nonpayment of special tax. Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills without having paid the special tax as required by law shall, for every such offense, be fined not less than $100 nor more than

$5,000 and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be for feited to the United States" (R. S., Sec. 3281; Feb. 8, 1875, c. 36, Sec. 16, 18 Stat, 310).

POINTS AND AUTHORITIES.

Substantial issues relied upon are as follows:

1. This law was repealed by the adoption of the Eighteenth Amendment to the Constitution of the United States and the adoption of the National Prohibition Act.

U. S. v. Yuginovich, 256 U. S. 450, 65 L. Ed. 1043, 41 S. Ct. 551.

2. If it has been re-enacted at all it is only by reason of the enactment of the Act of Congress of November 23, 1921 (Willis-Campbell Act), which statute is set out in its entirety in Appendix 1.

U. S. v. Stafoff, 260 U. S. 477, 67 L. Ed. 358;
U. S. v. Remus, 260 U. S. 477, 67 L. Ed. 358.

What sections of the old internal revenue laws were or were not re-enacted by that Act was wholly unconsidered in either the Stafoff or the Remus case.

Murphy v. United States, 38 F. (2d) 441.

3. Section 1397 above cited is in direct conflict with the National Prohibition Act, and the Act supplemental to the National Prohibition Act and was not re-enacted by the provisions of the Act supplemental to the National Prohibition Act.

Bailey v. U. S., 5 F. (2d) 437.

4. Whatever old internal revenue statutes have been re-enacted by the act supplemental to the National Prohibition Act were re-enacted not as revenue provisions, but as

penal provisions in aid of enforcement of national prohibition, and therefore have been rendered inoperative by adoption of the Twenty-first Amendment to the United States Constitution repealing the Eighteenth Amendment and all laws enacted thereunder.

Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 106;
Fontenot v. Accardo, 278 Fed. 871;
United States v. Chambers, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763.

ARGUMENT.

Section 1 of the Eighteenth Amendment to the Constitution of the United States is as follows:

> "After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

1. On October 28, 1919, Congress passed the National Prohibition Act, which provided, among other things, the following:

Section 3, Title 2, National Prohibition Act (Section 12, Title 27, U. S. C. A.—

> "Manufacture, sale, transportation, importation or exportation, delivery, furnishing, or possessing intoxicating liquors prohibited; exceptions. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: Provided, That nothing in this chapter shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of

purchasing and selling such warehouse receipts" (Oct. 28, 1919, c. 85, Title II, Sec. 3, 41 Stat. 308).

Section 25, Title 2, National Prohibition Act (Section 39, Title 27, U. S. C. A.)—

"Unlawful possession of liquor or property designed for manufacture thereof; search warrants. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in sections 434 to 454, and 456 of Title 17, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all other property designed for the unlawful manufacture of liquor, shall be destroyed, unless the Court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process" (Oct. 28, 1919, c. 85, Title II, Sec. 25, 41 Stat. 315).

Section 29, Title 2, National Prohibition Act (Section 46, Title 27, U. S. C. A.)—

"Punishment for unlawful manufacture or sale of

liquor or violation of permits. Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

"Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar" (Oct. 28, 1919, c. 85, Title II, Sec. 29, 41 Stat. 316).

Congress afterwards amended this section of the act by providing that upon conviction persons were liable to a sentence in the penitentiary for a term not to exceed five years or a fine of not more than $10,000, or both, and still later amended it to provide for other and different penalties, all of which penalties were different from the penalties provided in Section 1397 of Title 26, U. S. C. A.

And Section 35, Title 2, National Prohibition Act (Section 52, Title 27, U. S. C. A.)—

"Repeal: liquor taxes and penalties. All provisions of law that are inconsistent with this chapter are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This chapter shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this chapter relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws" (Oct. 28, 1919, c. 85, Title II, Sec. 35, 41 Stat. 317).

This Court held that the provisions of that act, outlawing as it did the manufacture, transportation, sale and possession of intoxicating beverages, together with the provision for lesser and special penalties for failing to pay the special taxes in double the amount previously payable, together with additional penalties, repealed all prior internal revenue laws upon intoxicating beverages.

U. S. v. Yuginovich, 256 U. S. 540, 65 L. Ed. 1043, 41 S. Ct. 551.

2. The Act supplemental to the National Prohibition Act (set out in Appendix 1) re-enacted all laws in regard to the manufacture and taxation of intoxicating liquor, and all penalties for violations of such laws that were in force

when the National Prohibition Act was enacted, except such provisions of such laws as were in direct conflict with any provision of the National Prohibition Act or of the Act supplemental to the National Prohibition Act, but what sections were thus re-enacted remained wholly unconsidered in either the Remus case or the Stafoff case.

U. S. v. Stafoff, 260 U. S. 477, 67 L. Ed. 358;
Murphy v. United States, 38 F. (2d) 441.

Section 5 of the Act supplemental to the National Prohibition Act (Section 3, Title 27, U. S. C. A.), which was held in the Stafoff and Remus cases, above cited, to have re-enacted the provisions of previous revenue laws regarding intoxicating beverages, did not, by its terms, state which sections were re-enacted, but merely provided that those provisions that were not in direct conflict with the National Prohibition Act were to be and remain in force. The case did not consider which particular sections were or were not in such direct conflict (Murphy v. United States, 38 F. [2d] 441), but merely decided that the former provisions contained in section 52, title 27, which had previously repealed all former revenue laws that were merely inconsistent with the National Prohibition Act, was superseded by Section 3, Title 27, U. S. C. A., which restored all statutes not in direct conflict.

3. It was held in Bailey v. United States, 5 F. (2d) 437, that the tax imposed upon wholesale liquor dealers, which had been repealed by the National Prohibition Act, had not been re-enacted, although the reasons for this holding are not stated in the opinion. An examination of that section and its cognate provisions makes the conclusion in the former case logically inevitable. The section in question reads:

"Section 1397. Penalties and forfeitures. (a) Rectifiers, liquor dealers, dealers in malt liquors, and manufacturers of stills—(1) Nonpayment of special tax. Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills without having paid the special tax as required by law shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States" (R. S., Sec. 3281, Feb. 8, 1875, c. 36, Sec. 16, 18 Stat. 310).

The due date of the payment of this tax was provided by Section 186, Title 26, U. S. C. A. (now replaced by Section 1402, Title 26, U. S. C. A.), which is as follows:

"Section 186. When due; returns. All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced to the 1st day of July following. It shall be the duty of special taxpayers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive

such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence, as provided for in section 97 of this title" (Oct. 1, 1890, c. 1244, Sec. 53, 26 Stat. 624).

Reading these two sections together, the imposition of the tax, and the provision how and when it is to be paid, is shown at once to be in direct and irreconcilable conflict with all the provisions of the National Prohibition Act and the Act supplemental to the National Prohibition Act above cited. When it is seen that Section 12, Title 27, prohibits the manufacture, sale or possession of intoxicating liquor, Section 39 abolishes all property right therein and Section 52 specifically renders impossible of performance the provisions of the former revenue law by making it unlawful to sell the stamps in advance, and making the tax assessable in double the amount only after evidence of the commission of an illegal act, it becomes clear that this section could not have been re-enacted because of direct conflict with the National Prohibition Act. If the term "direct conflict" has any significance, it means impossibility of simultaneous co-existence. A statute which renders it impossible to accept a special tax and issue the stamp therefor in advance in the commission of an act rendered by it unlawful, is necessarily in direct conflict with a former law requiring a special tax in advance for the performance of such acts previously sanctioned by law.

4. Whatever old internal revenue statutes re-enacted by the act supplemental to the National Prohibition Act were re-enacted not as revenue provisions, but as penal provisions in aid of enforcement of national prohibition, and therefore have been repealed by adoption of the Twenty-first Amendment to the United States Constitution repeal-

ing the Eighteenth Amendment and all laws enacted thereunder.

> Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 106;
> Fontenot v. Accardo, 278 Fed. 871.

The prosecution in the instant case proceeded on the theory that the provisions of the Willis-Campbell Act (Appendix 1) and particularly Section 5 thereof (Section 3, Title 27, U. S. C. A.), restored the former revenue statutes on intoxicating liquor as such. But such position is clearly untenable in view of the act itself, as well as of the Eighteenth Amendment to the United States Constitution then in force. These statutes were originally passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States, and the Government derived large revenue from taxing the manufacture and sale of intoxicating beverages, but as is pointed out by Mr. Justice Day in United States v. Yuginovich, this policy was radically changed by the adoption of the Eighteenth Amendment to the said Constitution. The Court says, 256 U. S. 450, bottom of page 459:

> "The Eighteenth Amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the Amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act, 41 Stat. at L. 305, chap. 83. It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes."

The subsequent provisions of the law were clearly not intended to raise revenue but to lay additional burdens in

the nature of penalties upon unlawful manufacture. The mere use of the word "tax" does not preclude the fact that it was a penalty laid only after the evidence of the commission of a crime. This Court, in Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 1061, says:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid. Child Labor Tax Case (May 15, 1922) (259 U. S. 20, ante, 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449). When by its very nature the imposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605, 613, 47 L. Ed. 614, 617, 23 Sup. Ct. Rep. 427. Evidence of crime (Section 29) is essential to assessment under Section 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government,' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. O'Sullivan v. Felix, 233 U. S. 318, 324, 58 L. Ed. 980, 982, 34 Sup. Ct. Rep. 596."

It was pointed out in Fontenot v. Accardo, 278 F. 871, on page 875:

> "It will be noted that section 35 of the act authorizes an assessment, not upon liquor, but upon the illegal manufacture or sale of liquor. That is made clear by the provision that payment of the tax or penalty shall not be made in advance, and when made shall give no right to engage in the manufacture or sale of liquor. A license to engage in the business of a manufacturer of liquor, or in that of a retail liquor dealer, cannot any longer be obtained. The act so declares, and a license for such a business would be inconsistent with the whole purpose of the Eighteenth Amendment. A license tax is something which one

who engages in a lawful business or occupation may be obliged to pay. When the occupation is made unlawful, the license tax thereon is no longer collectible, but is repealed. The act does not anywhere levy any taxes, and its whole purpose is inconsistent with the theory that it was intended to continue license taxes upon manufacturers or retail liquor dealers. Section 35 is consistent with the general purpose of the act to prohibit, to punish, to forfeit, and to assess penalties. We do not think, therefore, that the assessments here involved were tax assessments."

A reading of the entire act supplemental to the National Prohibition Act reveals that it was intended solely to aid in the enforcement of national prohibition.

Referring to the first section of the Eighteenth Amendment it will be seen to be a restriction upon state and congressional power and the deduction from it is that neither the states nor Congress can enact legislation that contravenes its prohibition. There is no room for controversy as to its requirements. Its prohibition of intoxicating liquors for beverage purposes is absolute. As accessory to that prohibition is the further prohibition of their manufacture, sale or transportation within or their importation into or exportation from the United States.

The supplemental act was entitled "An Act Supplemental to the National Prohibition Act." It was passed to aid enforcement of prohibition and not to raise revenue. It authorizes and purports to regulate the prescribing of liquors for medicinal purposes, prohibits importation and manufacture until the supply then in distilleries and other bonded warehouses shall be reduced to an amount not sufficient for nonbeverage purposes, permits spirits produced in this country and exported to be returned for redeposit in bonded warehouses from which originally taken,

extends the National Prohibition Act to all the territory of the United States and makes all violators liable to the penalties provided for in the original act.

Section 5 of the Supplemental Act, which is the only section which might be considered a re-enacting clause, does not make a tax out of what was before its passage a penalty. It does not change the classification of exactions declared in Lipke v. Lederer, 259 U. S. 577, 66 L. Ed. 1061, and Regal Drug Company v. Wardell, 260 U. S. 386, 43 S. Ct. 152, 67 L. Ed. 318.

The Constitution, at the time of the passage of the act, forbade, and the National Prohibition Act denounced as crime, the manufacture, sale and transportation of intoxicating liquor for beverage purposes. The exactions in respect of such liquor were properly to be considered to enforce prohibition and to punish violations of law. The Willis-Campbell Act expressly saved all measures for enforcement, the exaction dependent on the commission of crime. The title of the Supplemental Act, as well as all the provisions of the act, indicate that the entire purpose of it was to extend, clarify and strengthen the provisions of the National Prohibition Act. It is interesting to observe that the Willis-Campbell Act was first introduced in the Senate by Senator Willis on the 20th day of June, 1921, as Senate Bill 2116, and that only on the following day, June 21, 1921, was its companion measure introduced by Mr. Campbell in the House of Representatives as H. R. 7294. In the subsequent debates in both Houses, as revealed by the Congressional Record, it turned out that the House measure was finally adopted, but nowhere did it appear that either House regarded the act as a revenue measure, which, under the Constitution, had to originate in the House of Representatives, and no question of the prerogatives of the House with regards to revenue legis-

lation was even suggested in the course of all the debates in joint committee meetings. It may further be observed that when section five of the act was codified, it was included, as Section 3, in Title 27, U: S. C. A., which title deals with intoxicating liquors and not with internal revenue.

It must be inescapably clear that whatever validity the section in question, and similar provisions of the old internal revenue laws dealing with liquor, may have gained by their re-enactment under Section 3, Title 27, U. S. C. A., was solely as penal provisions in aid of the laws enacted by Congress by virtue of its power under the Eighteenth Amendment to the Constitution of the United States. But with the expiration of their authority, by the adoption of the Twenty-first Amendment repealing the Eighteenth Amendment, all such legislation was necessarily left without any constitutional authority and became null and void.

CONCLUSION.

It is urged that under either view of the case above presented, section 1397 has been repealed and not re-enacted. In the first place, the provisions of this section and of its companion section providing when and how payment is to be made is in such direct conflict with the National Prohibition Act that it could not have been re-enacted by Section 3, Title 27, U. S. C. A. In the second place, whatever of the former revenue laws may have been re-enacted by Section 3, Title 27, U. S. C. A., were necessarily re-enacted as penal statutes in aid of prohibition, and their force and validity as such statutes necessarily expired with the repeal of the Eighteenth Amendment to the Constitution and the adoption of the Twenty-first

Amendment. Since the 5th day of December, 1933, and at the time of the return of the indictment in the instant case, on the 4th day of May, 1934, and subsequently on the date when this cause was brought to trial, on the 2nd day of December, 1935, the United States District Court for the Eastern District of Wisconsin was without jurisdiction to try the issues in the said count, for that all penal statutes in aid of national prohibition had necessarily expired and the United States was without power and authority to proceed in the matter.

For all such reasons, it is urged that the conviction of the defendants on count two of this indictment be reversed.

Respectfully submitted,

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